

Served: June 29, 1992

NTSB Order No. EA-3599

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 9th day of June, 1992

BARRY LAMBERT HARRIS,  
Acting Administrator,  
Federal Aviation Administration,

Complainant,

SE-10214

v.

CHARLES G. KALKO,

Respondent.

**OPINION AND ORDER**

The respondent has appealed from the oral initial decision Administrative Law Judge William A. Pope, II, issued in this proceeding on December 7, 1989, at the conclusion of an evidentiary hearing.<sup>1</sup> By that decision the law judge affirmed in part an order of the Administrator suspending respondent's private pilot certificate on allegations that he violated sections 91.87(b) and 91.9 of the Federal Aviation Regulations ("FAR"), 14 C.F.R. Part 91, by carelessly operating experimental aircraft N230XX on a flight which landed at Lawrence Municipal Airport, an airport with an operating control tower, without

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<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached.

establishing or maintaining two-way radio communications with the tower.<sup>2</sup> The order, which was filed as the complaint in this matter, further alleged that respondent overtook aircraft N63387 on final approach to Runway 5, thereby forcing the tower controller to require N63387 to execute a go-around. The complaint also alleged that as a result of this operation respondent violated FAR sections 91.67(e) and (f),<sup>3</sup> but the law judge did not sustain these allegations and modified the sanction from a 120-day suspension to a 30-day suspension of respondent's airman certificate.<sup>4</sup>

Respondent asserts on appeal that the law judge erred in affirming the Section 91.87(b) allegation, arguing that his

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<sup>2</sup>FAR §§ 91.87(b) and 91.9 provided at the time of the incident as follows:

"§ 91.87 Operation at airports with operating control towers....

(b) Communications with control towers operated by the United States. No person may, within an airport traffic area, operate an aircraft to, from, or on an airport having a control tower operated by the United States unless two-way radio communications are maintained between that aircraft and the control tower. However, if the aircraft radio fails in flight, he may operate that aircraft and land if weather conditions are at or above basic VFR weather minimums, he maintains visual contact with the tower, and he receives a clearance to land. If the aircraft radio fails while in flight under IFR, he must comply with § 91.127.

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

<sup>3</sup>At the time of the incident FAR §§ 91.67 pertained to right-of-way rules.

<sup>4</sup>The Administrator has not appealed the findings as to FAR §§91.67(e) and (f), nor has he appealed the modification of sanction.

operation falls within the exception contained in the regulation.<sup>5</sup> As to the Section 91.9 finding, respondent asserts that it should also be reversed, as the only facts found by the law judge to support that violation are those facts which the law judge erroneously relied upon to sustain the section 91.87(b) allegation. Finally, respondent asserts that even if any or all of the law judge's findings are affirmed by the Board, the sanction assessed by the law judge is excessive and should be further modified. The Administrator has filed a brief in reply, urging the Board to affirm the initial decision in all respects, including the 30-day suspension, or, in the alternative, to remand the case to the law judge.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order, in part. For the reasons that follow, we will grant respondent's appeal by reversing the initial decision as to the finding of a violation of Section 91.87(b). As to the Section 91.9 allegation, however, we will deny respondent's appeal, for reasons other than those expressed in the initial decision, and affirm the sanction assessed by the law judge.

Respondent admits that he was pilot in command of experimental aircraft N230XX. On the day in question, he decided to make an unplanned stop at Lawrence Municipal Airport because

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<sup>5</sup>See n.2, supra.

of possibly deteriorating weather conditions ahead.<sup>6</sup> Respondent knew from his sectional chart that Lawrence Airport had a control tower, so he radioed the tower as he approached in order to advise them of his intent to land. Only then did he discover that his radio was inoperable.<sup>7</sup>

According to respondent, he circled the field three times, trying to get the attention of the tower.<sup>8</sup> Each time he circled, he came in closer. He also claims that he did a "wing-waggle" to get their attention, but that because his aircraft was small it was more of a "Dutch roll," though he never changed his altitude.<sup>9</sup> In any event, he did not receive a response from the tower, apparently causing him to wonder if it was abandoned for

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<sup>6</sup>Respondent noted cloud formation ahead of him and decided to make the unplanned stop so he could re-fuel in the event he had to terminate his trip later because of the weather. There is no dispute that at the time of the landing at Lawrence Airport, the weather was VFR.

<sup>7</sup>The law judge found as a matter of credibility that respondent suffered an in-flight radio failure. We have no reason to disturb this finding.

<sup>8</sup>According to the Administrator's witnesses, when an aircraft has an in-flight radio failure and wishes to land at a controlled airport, he should fly on a downwind, possibly rock his wings [a "wing-waggle"] or flash his lights to gain the attention of the tower, and, once the tower sees him and understands he is a "no radio," the tower will give him a green light to land, once they have determined he is not going to cut off any other traffic in the pattern. The tower may also give an aircraft a red light to signal that a landing should not be made. In this case, the tower never gave respondent a red light signal.

<sup>9</sup>There was no evidence presented by the Administrator that anything but a "wing-waggle" was permissible, but it was apparently respondent's sharp turns which caused the controllers to be concerned and to at least initially not comprehend his desire to land.

the weekend.

Respondent testified that he observed 2 or 3 aircraft performing "touch and go" landings before he entered the downwind leg of the traffic pattern. He claims that when he turned from downwind to base, he received a green light signal from the tower, clearing him to land. He also claims that when he turned base he saw a Cessna about a mile to his right, coming in on an excessively long final, and travelling at no more than 60 knots. (Respondent was travelling at approximately 120 knots.) Respondent asserts that the Cessna, later identified as N63387, was never in front of him on final and that he never saw any aircraft in front of him execute a go-around.

The local controller on duty in the tower at the time of the incident first observed respondent when he was already in the traffic pattern, behind N63387 on the downwind leg. He described respondent's operation as a series of sharp left and right turns, and noted that respondent was travelling at a much faster speed than other aircraft in the traffic pattern. The local controller made a broadcast to everyone in the traffic pattern, cautioning them about respondent's aircraft.

In the local controller's opinion, respondent was overtaking N63387. He insists that N63387 had already turned final when respondent turned left base to final. The local controller instructed N63387 to execute a go-around, and only then did he give respondent a green light, clearing him to land. The local controller testified that he sent N63387 around in order to

increase separation, because he considered the situation unsafe.

The controller working the ground control position testified that he saw respondent cut off N63387 when respondent entered the traffic pattern, and that he saw N63387 precede respondent on final. The ground controller corroborated the local controller's testimony that respondent was not given the green light to land until after N63387 had been instructed to go around. The law judge found that the testimony of the air traffic controllers was more credible than respondent's testimony, and respondent offers us no persuasive reason to disturb that finding, which is within the province of the law judge.

The law judge concluded that the FAR section 91.87(b) allegation should be affirmed because respondent had entered the downwind leg of the traffic pattern before receiving the green light signal to land. Respondent asserts that this finding is erroneous because his operation falls within the exception contained in Section 91.87(b) which permits a "no-radio" aircraft to land at a controlled airport if the weather is at or above basic VFR minimums, he maintains visual contact with the tower, and he receives a clearance to land. Respondent argues that the law judge in his initial decision seems to engraft onto the regulation the additional requirement that the clearance to land be received before the aircraft enters the traffic pattern or downwind leg. We agree with respondent that the only requirement set forth in the regulation is that the clearance to land be

received before landing.<sup>10</sup> Nor does the Administrator disagree with this interpretation.<sup>11</sup> We will reverse the Section 91.87(b) finding.

Respondent next contends that the law judge's finding as to the FAR section 91.9 violation should be reversed since it is based solely on his determination that respondent failed to "...exercise good judgment when he entered the landing [traffic] pattern...." While we agree that the erroneous finding of a violation of FAR section 91.87(b) cannot support a residual finding of a violation of FAR section 91.9, the violation is nonetheless supported by the law judge's factual findings which establish carelessness during respondent's operation in the traffic pattern. In the Board's view, the fact that the controller was forced to instruct N63387 to execute a go-around in order to insure his safe separation from respondent's

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<sup>10</sup> Our understanding of the exception contained in Section 91.87(b) appears to be supported by Section 205(a)(3) of the Airman's Information Manual (AIM), which provides the following guidance:

"(3) Transmitter and receiver inoperative - Remain outside or above the airport traffic area until the direction and flow of traffic has been determined, then join the airport traffic pattern and maintain visual contact with the tower to receive light signals...."

<sup>11</sup> While the Administrator concedes this point, he asserts that the exception contained in section 91.87(b) is nonetheless inapplicable here because respondent failed to prove that he maintained visual contact with the tower before receiving the signal to land. We disagree. Respondent testified that he endeavored to gain the attention of the tower from the moment he entered the traffic pattern. His testimony is corroborated by the controllers, who testified that they observed respondent immediately after he entered the traffic pattern.

aircraft, which was on final with N63387 simultaneously,<sup>12</sup> was a direct result of respondent's careless operation by overtaking a slower aircraft already on final and created at least a potential for hazard. Administrator v. Newmark, 2 NTSB 1749 (1975). Under the circumstances, we consider a 30-day suspension of respondent's airman certificate to be a minimal sanction.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is granted in part and denied in part;
2. The initial decision is reversed as to the FAR section 91.87(b) allegation and the Administrator's order, as modified by the law judge, and the initial decision are affirmed as to the FAR section 91.9 allegation and as to sanction; and
3. The 30-day suspension of respondent's private pilot certificate shall begin 30 days after service of this order.<sup>13</sup>

COUGHLIN, Acting Chairman, KOLSTAD, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order. Member LAUBER submitted the following dissenting statement.

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<sup>12</sup>According to the local controller, had he not instructed N63387 to go around, less than half of the required 3,000 foot separation between the two aircraft would have existed.

<sup>13</sup>For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).



Notation 5754  
June 9, 1992

John K. Lauber, Member, dissenting:

I respectfully disagree with the majority opinion, and would grant the respondent's appeal.

It is not established by the record before us that the respondent was careless and reckless in his operation of N230XX as alleged. When the respondent experienced a radio failure, he did exactly what he was supposed to do: he entered the traffic pattern, and proceeded to rock his wings in order to get the attention of the controllers. When he did come to the attention of the controllers, they failed to provide any indication to him that they were aware of his presence by means of appropriate light signals. Respondent then flew a normal traffic pattern, and eventually received a steady green light indicating that he was cleared to land. He did so without conflict with Cessna N63387.

The mere fact that the respondent's much faster aircraft was overtaking the Cessna is not evidence of careless or reckless operation. The law judge found that he never got closer than one half mile, and that "the respondent did not overtake Cessna 387" (Oral Initial Decision and Order, p 174, lines 7-17). Furthermore, the only reason that the Cessna went around was because he was sent around by the local controller. But contrary to the language in the majority opinion, the controller was not "forced to instruct N63387 to execute a go-around." Every pilot and controller knows the right-of-way rule regarding overtaken and overtaking aircraft (91.67), and the controller erred in not sending the respondent's aircraft around, which he could have done simply by displaying a steady red light followed by a flashing green light.

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John K. Lauber